DISTRICT OF COLUMBIA
OFFICE OF ADMINISTRATIVE HEARINGS
941 North Capitol Street, NE, Suite 9100
Washington, DC 20002

DISTRICT OF COLUMBIA DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS Petitioner, v. JOSHUA AND KATHERINE FREY Respondents.	Case No.: CR-C-06-100027

FINAL ORDER

I. INTRODUCTION

On October 6, 2005, the Government issued Building Permit B477388 to Respondents. The Building Permit authorized Respondents to construct, *inter alia*, a new detached garage on their property at 5044 Dana Place, N.W. ("Property"). The Government inspected the Property on or about April 19, 2006, and ultimately determined that even though construction had proceeded in conformity with the plans submitted with Respondents' Building Permit application, the Building Permit was issued in error, as the garage violated certain zoning regulations. On June 27, 2006, the Government read its June 22, 2006, "Notice to Revoke Building Permit Number B477388" ("Notice to Revoke") to Respondents over the telephone. On June 30, 2006, Respondents simultaneously asked the Government to reconsider its proposed Notice to Revoke and filed an appeal of the Notice to Revoke with this administrative court. After numerous motions for continuance and enlargements of time, an evidentiary hearing was

held on January 23, 2007. During the hearing, Lennox Douglas, Division Chief, Permit Operations; Yvonne Rockett, Inspector; Alma Gates, ANC Representative; Alec Klein, neighbor; and William Crews, Zoning Administrator testified on behalf of the Government. Katherine Frey, Respondent; and David Drew, Owner, Drew Construction testified on behalf of Respondents. I admitted Government's exhibits 100-117 and Respondents' exhibits 200-204, 206, 206A, and 207 during the hearing.

At the evidentiary hearing held on January 23, 2007, the Government argued, for the first time, that this administrative court lacked subject-matter jurisdiction over this case. At the request of Respondents, and over the Government's objection, I nonetheless held the evidentiary hearing and ordered post-hearing briefing. Both parties have had an opportunity to brief fully all issues that they presumably felt were germane to my final decision. The Government argued four basic points: 1) this administrative court lacks subject-matter jurisdiction over Respondent's appeal; 2) there is no case or controversy to be resolved; 3) Respondents submitted false and misleading information with their Build Permit application; and 4) the doctrines of equitable estoppel and laches are not bars to revocation of the Building Permit. Respondents reject the Government's arguments and maintain that this administrative court has properly exercised jurisdiction over this matter, and that the doctrine of equitable estoppel precludes the Government from revoking their Building Permit.

II. FINDINGS OF FACT

1. Respondents purchased the Property in June 2004. After Respondents decided to move into the house, they retained Mangan Group Architects to help them

conceptualize work they wanted to do on the house and Property. Exhibit 200. Mangan Group developed comprehensive drawings of the proposed construction. Exhibit 200. At the time they purchased the Property, Respondents lived with their son in a townhouse in Foxhall Village.

2. On June 24, 2005, Respondents, through their agent Mangan Group, filed an application with the Department of Consumer and Regulatory Affairs ("DCRA") for a building permit to demolish a portion of the house, construct an addition on the house, renovate the remaining portion of the house, and build a new detached garage. Exhibits 101 and 102. The permit application was submitted with extensive architectural drawings concerning the house and the disputed garage. Exhibits 104 and 106. *See* 11 DCMR 3202.2.

3. As part of the permit application, Respondents submitted a D.C. Surveyor's Plat that identified the "thumb print" of any existing structure on the site, as well as for proposed construction. Exhibit 104. The Surveyor's Plat indicated the thumb print of the "new 2-story frame detached garage." Exhibit 104. The Surveyor's Plat was stamped "DCRA/OFFICE OF THE ZONING ADMINISTRATOR/COMPLIES WITH THE REQUIREMENTS OF DC ZONING REGULATIONS (11 DCMR)" (emphasis in original) Exhibit 104. This stamped approval language was signed by "R. Joseph" and dated September 14, 2005. Exhibit 104. It also bears the hand written notation under the stamp "3 story addition and garage." Exhibit 104.

4. While the permit application itself only indicated that a "new detached garage" was going to be built (exhibit 101), Respondents also submitted architectural drawings

that captured all of the details of the proposed garage. Exhibits 106 and 200. These drawings clearly establish that the garage will be two stories, show the elevation from a front, left, right and rear perspective, and identify the proposed use of the second floor to be an "artist's studio." Exhibits 106 and 200. At its highest, the proposed garage would be twenty three feet, eight inches tall. Exhibit 106.

5. After reviewing the permit application, DCRA circulated the permit application to the required, in-house disciplines for approval, e.g. plumbing and electrical. Exhibit 103. Among others, DCRA referred the permit application to the Office of the Zoning Administrator ("OZA"), which approved the permit application on September 14, 2005. Exhibit 103. After the relevant disciplines had reviewed and approved the permit application, DCRA subjected the permit application to a quality control review. The permit application received quality control approval on October 5, 2005. Exhibit 103. Accordingly, DCRA issued the Build Permit on October 6, 2005. Exhibit 107.

6. Respondents hired Drew Construction to build the house and garage. Drew Construction built the house and garage according to the architectural plans that had been approved by the Government. Drew Construction began demolition at the Property in December 2005.

7. After receiving a complaint from ANC Commissioner Alma Gates and a neighbor (Alec Klein) regarding the height of the garage, on or about April 19, 2006, OZA sent Zoning Inspector Yvonne Rockett to the Property. Upon inspection, Inspector Rockett described the garage was "fairly far along in the construction process." The

walls were up, the windows and doors were in place, the roof was on and the plumbing and wiring were installed. Exhibits 108-112 and 202. Inspector Rockett measured the height of the garage and determined that the front side measured "twenty two point eighteen."[1] Exhibit 108.

8. On or about April 20, 2006, Inspector Rockett gave the results of her property inspection, including measurements of the garage, to William Crews, Zoning Administrator. Mr. Crews directed a technical reviewer on his staff to review the situation and report back to him. Based on the information provided to Mr. Crews, he determined that the garage violated the zoning regulations, because the second story of a garage in this zone could not be used for the stated purpose (Artist Studio). Therefore, the garage should have only one story and no higher than fifteen feet from grade to the top of the roof. Further, Mr. Crews determined that the only allowable use for a two story garage in this zone was for domestic employee living quarters. However, even if the use was changed, Respondents' garage violated the zoning regulations, because this use (domestic employee living quarters) restricted the height of the garage to twenty feet (from grade to top of the roof). Additionally, the garage would have had to have been situated at least twenty-five feet from Respondents' house and eight feet from each side-lot line.[2] Mr. Crews received the information from his technical reviewer regarding Respondents' garage in mid-May 2006. Mr. Crews then sought assistance in preparing

[1] Inspector Rockett's testimony concerning what she meant by "twenty two point eighteen" clarified the notion ("22.18") on exhibit 108 to mean twenty-two feet eighteen inches, or twenty-three feet six inches, which is the sum of twenty-two feet plus eighteen inches.

[2] The garage is closer to Respondents' house than twenty-five feet and significantly closer than eight feet to the side-lot line that borders the Klein property.

the notice of proposed revocation from the DCRA Office of General Counsel. The review process culminated in the June 22, 2006, Notice to Revoke.

9. It is Mr. Crews's policy not to inform homeowners, or their contractors, that his office is contemplating revocation of their building permit. This policy is grounded in the concern that while agency deliberations proceed, the construction process will be accelerated to render the revocation moot. Thus, from the time of Inspector Rockett's visit to the Property on April 19, 2006, until June 27, 2006, when the Notice to Revoke was read over to them over the telephone, Respondents had no inkling of the determination that their garage was arguably illegal or that the Government was preparing to revoke their Building Permit. So, in the absence of any indication from DCRA that there was a problem, construction of the garage continued apace. By June 27, 2006, shingles had been put on the roof, and exterior siding was also in place. Exhibits 203 – 203B.[3] At this point, the garage was approximately 85% complete.

10. When work on the garage stopped on June 27, 2006, Respondents had already incurred construction costs attributed to the garage in the amount of $105,387.11. Exhibit 206A. It would cost an additional $50,000 to tear the garage down and clean up the site (which would include, *inter alia*, filling the hole dug out for the garage, or building a retaining wall, and capping off the electrical and plumbing connections).

III. DISCUSSION AND CONCLUSIONS OF LAW

[3] While these pictures were taken on July 22, 2006, after the Notice to Revoke and the Stop Work Order were served, they demonstrate the condition of the garage on June 27, 2006, because but for certain steps to protect the garage and the public, all construction on the garage had stopped as of June 27, 2006.

The Government argues four major points in support of the disputed Notice to Revoke: 1) this administrative court lacks subject-matter jurisdiction over building permit revocation matters when the underlying premise for the revocation is a violation of the Zoning Regulations, as exists in this case; 2) there is no case or controversy to be resolved; 3) Respondents submitted false and misleading information with their Build Permit application; and 4) the doctrines of equitable estoppel and laches are not bars to revocation of the Building Permit. Respondents reject the Government's position and argue strongly that the doctrine of equitable estoppel precludes the Government from revoking their Building Permit. I will address each issue in turn.

1. Subject-Matter Jurisdiction

Petitioner has argued that the Board of Zoning Adjustment ("BZA"), and not this administrative court, has jurisdiction over this case. In support of its argument, Petitioner has cited a number of statutory and regulatory provisions, as well as case law from the District of Columbia Court of Appeals. After careful review of Petitioner's position and the counter-argument of Respondents, I conclude that this administrative court does indeed have subject matter jurisdiction over this and other cases where a party appeals the proposed revocation of a building permit, even when the basis for the revocation is a violation of the Zoning Regulations.

Section 105.6.4 of Title 12A of the D.C. Municipal Regulations makes clear that the Office of Administrative Hearings ("OAH")[4] has original jurisdiction over all contested cases related to permit revocations. In fact, the plain language of the regulation

[4] OAH assumed jurisdiction over contested cases formerly adjudicated by the DCRA Office of Adjudication ("OAD"). *See* D.C. Code, 2001 Ed. § 2-1831.03(b)(2).

requires a respondent seeking administrative review of a notice of revocation to file a hearing request with OAH. Section 105.6.4 provides, "[a] request for a hearing on a permit … revocation *must* be made directly to [OAH.]" (emphasis added).

In support of its position, Petitioner cites to District laws that authorize the BZA to "hear and decide appeals where it is alleged by the appellant that there is error in any … decision . . . made by any administrative officer or body … in the administration or enforcement of the Zoning Regulations." 11 DCMR § 3100.2. *See also* D.C. Code, 2001 Ed. § 6-641.07(g)(1). Petitioner also cites to provisions that grant jurisdiction to the BZA over "appeals timely filed by persons aggrieved by orders issued by hearing examiners" when those appeals involve "infractions" of the zoning laws. D.C. Code, 2001 Ed. § 2-1803.01. *See also* 16 DCMR 3118.10. OAH's own enabling act acknowledges this limitation, providing that the BZA and other agencies in certain cases "retain jurisdiction to … determine appeals from orders of Administrative Law Judges." *See* D.C. Code, 2001 § 2-1831.16(b).

However, Petitioner confuses Respondents' request for an initial administrative review of the Building Permit revocation (*i.e.* a request for an evidentiary hearing), with the second level administrative appeal that is vested, in certain circumstances involving zoning matters, with the BZA. None of the statutes or regulations cited by Petitioner establishes its claim that this administrative court is without jurisdiction. A Notice to Revoke is nothing more than a proposed action. 12A DCMR § 105.6.1. It does not become final unless affirmed after a hearing or the right to a hearing is waived. The law and regulations governing the administrative review process clearly vest original

jurisdiction to entertain requests for hearings concerning all Building Permit revocations with this administrative court (standing in the shoes of the former OAD).

Petitioner also directs this administrative court's attention to certain D.C. Court of Appeals decisions that it believes answer the question regarding subject matter jurisdiction in its favor. Petitioner's reliance on these cases is misplaced. *See Felicity's, Inc. v. District of Columbia Department of Consumer and Regulatory Affairs*, 817 A.2d 825 (D.C. 2003). In *Felicity's*, DCRA issued a notice of infraction charging Felicity's with violating numerous zoning regulations. *Felicity's,* 817 A.2d at 827. A hearing was held before an administrative law judge ("ALJ"), who ordered fines for the violations and informed respondent of its right to an appeal before the former Board of Adjustment and Review ("BAR"). *Felicity's,* 817 A.2d at 826-27. Following the ALJ's instructions regarding its appeal rights, Felicity's appealed the ALJ's order to the BAR, which affirmed the ALJ's order. *Felicity's,* 817 A.2d at 826-27. The Court of Appeals found that the BZA, and not the BAR, had jurisdiction to hear an appeal of a hearing decision concerning a notice of infraction involving Zoning Regulations. *Felicity's,* 817 A.2d at 829. As apparently neither party challenged the ALJ's jurisdiction to conduct the initial administrative hearing, the Court of Appeals is silent on the issue. *See also Walsh v. D.C. Bd. of Appeals & Review*, 826 A.2d 375, 377 (D.C. 2003) (finding that the BAR lacked jurisdiction to review fines issued by an ALJ for certificate of occupancy violations, but not disputing the ALJ's authority to issue those fines).

Petitioners also rely on *Bannum v. District of Columbia Board of Zoning Adjustment* in support of their argument that this administrative court lacks subject matter jurisdiction over building permit revocation hearings when the issue underlying the

revocation is a violation of the Zoning Regulations. *See Bannum v. District of Columbia Board of Zoning Adjustment*, 894 A.2d 423 (D.C. 2006). In *Bannum*, an Area Neighborhood Commission ("ANC") member appealed DCRA's issuance of a building permit to Bannum (for the construction and operation of a 150-bed community correction center), to the BZA. *Bannum*, 894 A.2d at 427-428. Thus, BZA was asked to hear an appeal filed by a third-party concerning the issuance of a permit, as compared to an appeal by the permittee concerning the revocation of a permit by the permitting authority.

Bannum had argued that the doctrine of equitable estoppel precluded the BZA from denying the permit, as Respondents herein have argued about DCRA's action. The Court of Appeals concluded that Bannum's reliance on "concurrence letters" to proceed with construction was not "justifiable and reasonable" (a consideration in the equitable estoppel doctrine), because the BZA, not the Zoning Administrator (who signed the concurrence letters) has the final say regarding the interpretation of the Zoning Regulations. *Bannum*, 894 A.2d at 431. However, the conclusion was predicated on the fact that the concurrences letters relied upon by Bannum were creatures of its own making. Bannum wrote unsolicited letters to DCRA setting forth Bannum's interpretation of the Zoning Regulations and asked for DCRA's concurrence. *Bannum*, 894 A.2d at 427. DCRA, without explanation or justification, simply approved Bannum's interpretation by signing Bannum's letters. The Court of Appeals' ruling is based on the fact that the concurrence letters were nothing more than "interlocutory 'administrative decision[s]'" that did not carry the same force as issuance of a building permit. *Bannum*, 894 A.2d at 430. Hence, it was not "justifiable and reasonable" for

Bannum to rely on these "unofficial" letters and begin construction before the appeal window had closed. *Bannum*, 894 A.2d at 430-431.

And therein lies the crucial distinction between Bannum and the Respondents herein; namely, Respondents are the permittee (as compared to a third-party), who relied on a final decision of DCRA (the Building Permit) before beginning construction, and notice of the revocation of the Building Permit came after the appeal time frame had closed. Thus, in concert with 12A DCMR 105.6.4 this administrative court, as compared to the BZA, has original jurisdiction over Respondents' appeal. *See also Murray v. District of Columbia Board of Zoning Adjustment*, 572 A.2d 1055, 1058 (D.C. 1990) (holding that a party could not prevail on a equitable estoppel theory when the party has invested in construction because it had notice that the decision of the Zoning Administrator was likely to be appealed).

Moreover, in *Perkins v. District of Columbia Board of Zoning Adjustment*, the Court of Appeals addressed very similar facts, yet did not rule that the BZA had jurisdiction over the initial, evidentiary revocation hearing. *Perkins v. District of Columbia Board of Zoning Adjustment*, 813 A.2d 206, 208 (D.C. 2002). In *Perkins*, DCRA had issued a notice of revocation of a certificate of occupancy, alleging that respondent had violated the terms of the certificate. The notice of revocation was dismissed after a hearing before the OAD (OAH's predecessor administrative court), as the ALJ determined that respondent's use of the property conformed to the terms of the certificate. *Perkins*, 813 A.2d at 208-09. The District then filed an appeal of the OAD decision with the BZA. *Perkins*, 813 A.2d at 209. The *Perkins* case is particularly instructive because, like the case at bar, the issue was a permit revoked by DCRA, the

revocation was predicated on application of the Zoning Regulations, and the initial hearing was heard by this administrative court's predecessor court (OAD), yet the Court of Appeals never even suggested in its opinion that only the BZA had jurisdiction over the initial fact finding hearing.

Additionally, this administrative court recently handled a very similar case (*DCRA v. Vu and Camacho*, Case No. CR-C-06-10009), in which the Government did not argue that this administrative court lacked subject matter jurisdiction over the matter. In the *Vu* case, Respondents had also received a building permit the Government sought to revoke approximately eight months after issuance, because the construction violated certain Zoning Regulations. Respondents in *Vu* also argued that the doctrine of equitable estoppel should also bar the Government from revoking the building permit. While the Government argued many points to support its position, as noted above, it never argued that this administrative court lacked subject matter jurisdiction.

Consequently, I find that this administrative court properly exercised its lawful authority to grant Respondents' request for a hearing and to determine the merits of the pending revocation.

2. No Case or Controversy and False and Misleading Information in Respondents' Application

The facts underlying the Government's arguments on these points are intertwined, so I will address legal arguments concerning these theories in this consolidated section. The Government argues these points on two essential facts: a) that Respondents' counsel has offered to settle this case by modifying Respondents' Building Permit application such that the purpose of the second story on the garage would be a domestic employee's living quarters (which Respondents believe would negate the concerns of the OZA); and b) that Respondents do not intend (and have never intended) to actually use the second story as an "artist's studio." Respondents argue in response that Ms. Frey's unrefuted testimony was that Respondents intended to use the second story in compliance with the Building Permit and the associated restrictions.

The interpretation of Ms. Frey's testimony is the fulcrum upon which these questions are answered. Thus, it is instructive to review a significant portion of her testimony to put her answers to questions in the proper context. During cross-examination by Ms. Parker-Woolridge, the following exchanges occurred:

> Question: Did you also rely on the plans that were, the drawings of the architect and the plans that were submitted?
>
> Answer: We did.
>
> Question: Was it your intent to use the second story as an artist's studio?
>
> Answer: To be honest, we thought that was architect-speak; we didn't know what an artist's studio exactly meant. He [the architect] put that to us as sort of a professional term or a term used in the industry. I can tell you what we indicated to him, which was that we wanted additional living space because we were not going to have a basement, so that was our goal.

> * * *
>
> To use it like you might use a basement or for just activities that you would want to take place in an air-conditioned or heated place versus an unfinished garage.
>
> * * *
>
> It might be storage . . . . We just didn't know; we didn't know how we were going to use it. I guess our position was it was in the future and we wanted the finished living space in place of a basement and we let sort of the experts hand what is within code and that they would tell us what we are allowed to do in that space and what restrictions there are and relying on them for that.
>
> * * *
>
> Question: So you conveyed your idea to your architect, what you wanted, and you left it up to the architect to put a terminology or words on the plans as to what the use was?
>
> Answer: Right, and we understand that there would be restrictions associated with that and we would comply with the restrictions. For instance, there's restrictions regarding home offices, he told us there were some restrictions about a parking space related to the artist's studio and we said that's fine, we can cooperate with that. We just wanted the finished living space.
>
> * * *
>
> On redirect by Mr. Miller:
>
> Question: Mrs. Frey, if you are allowed to build according to the permit you have and there are certain restrictions on the use that you can make of that second story of the garage, do you intend to comply with those restrictions?
>
> Answer: Absolutely.

Transcript of January 23, 2007, hearing, pages 212-214, and 230.

As the above-quoted testimony demonstrates, Respondents articulated their intended use of the second story of the disputed garage to their agent, Mangan Group Architects, and relied on the Mangan Group to square Respondents' goals with the

governing District of Columbia Building and Zoning Codes. There was absolutely no evidence establishing that Respondents or Mangan Group intentionally or actually submitted false or misleading information on the Building Permit application. Rather, the record demonstrates that Respondents, in good faith, explained what they wanted to use the space for and the Mangan Group, using its expertise, labeled that usage "artist's studio."

The Government has presented no authority for the proposition that building permit applicants, such as the Freys, who: a) honestly explain to their architect experts how they want to use their property; 2) relies in good faith on the advice of these experts as to what is an acceptable use for their property; and c) uses the experts to prepare the building permit application can be found to have submitted false or misleading information on their building permit application. Consequently, I conclude that Respondents submitted neither false nor misleading information in their Building Permit application.

The Government also argues that there is no case or controversy before me, because Respondents do not intend to use the space as an artist's studio, which is the only permitted use for that space. The Government contends that Ms. Frey's testimony and earlier inquiries of counsel whether changing the use to domestic employee's living quarters would resolve the Government's objection to the Frey's moving forward with the envisioned construction project established that Respondents do not intend to use the contested space for the permitted use.

The governing regulation does not define "artist studio;" however, it does set forth conditions on how an artist's studio may be used by a permittee. 11 DCMR 2300.3. The regulation requires interior storage space, restricts the number of artists that may work in the space, allows the incidental sale of artwork and the teaching of art, as well as establishes parking requirements. 11 DCMR 2300.3(a)-(e). The Government neither proffered a definition of "artist studio" used by OZA, nor explained how Respondents' intended use deviates from the permitted use. In essence, Ms. Frey said that within the confines of the law, she intended to use the space for storage and/or living space because their house does not have a basement, but the Government never elicited testimony from Ms. Frey regarding what she meant by "living space." Certainly, the Government never asked whether Mr. or Ms. Frey is an artist, or whether Respondents' son is a budding artist, or some other family member for that matter. Simply because Respondents may also want to use the space for their children to play in does not mean that the space will not be used as an "artist's studio." Thus, the Government has failed to satisfy its evidentiary burden on this point.

Additionally, even if the Government is correct and Respondents do not intend to use the space as an "artist's studio" (regardless of how that term is defined); there is still a case or controversy. The controversy before this administrative court is the propriety *vel non* of DCRA's revocation of the Building Permit issued to Respondents. The Government's argument regarding case or controversy is at best premature, in that until a certificate of occupancy is issued (or an application is denied); there is no basis to conclude (on the record before me) that this matter is moot because Respondents do not intend to use the space as permitted. In conclusion, I reject the Government's argument.

3. Equitable Estoppel

Respondents argue that the doctrine of equitable estoppel bars DCRA from revoking Building Permit No. B477388 more than eight months after it was issued, and after construction of Respondents' garage was 85% complete, at a cost of at least $105,000. DCRA argues that the doctrine of equitable estoppel is not available to Respondents because its application against a government entity is judicially disfavored, and because Respondents cannot prove the elements of estoppel.

DCRA's legal analysis is incomplete. It is true that "[t]he doctrine of equitable estoppel is judicially disfavored in zoning cases because of the important public interest in the integrity and enforcement of the zoning regulations." *Interdonato v. D.C. Board of Zoning Adjustment*, 429 A.2d 1000, 1003 (D.C. 1981) (citations omitted). However, although the doctrine is judicially disfavored, "the fundamental principle of equitable estoppel applies to government agencies, as well as private parties." *Investors Research Corp. v. SEC*, 628 F. 2d 168, 174 n.34 (D.C. Cir. 1980) (citing 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 17.01-17.04 (1958 & Supp. 1980). "[T]he 'sovereign' nature of an agency's action does not immunize the agency from the reach of equity." *ATC Petroleum, Inc. v. Sanders*, 860 F.2d 1104, 1113 (D.C. Cir. 1988) (citation omitted). Consequently, "[a]lthough the doctrine of equitable estoppel has traditionally not been favored when sought to be applied against a government entity … it is accepted that in certain circumstances an estoppel may be raised to prevent enforcement of municipal zoning ordinances." *Saah v. D.C. Board of Zoning Adjustment*, 433 A.2d 1114, 1116 (D.C. 1981) (citations omitted). *See also District of Columbia v. Cahill*, 54 F. 2d 453, 454 (D.C. 1931) ("Where a party acting in good faith under affirmative acts of a

city has made such expensive and permanent improvement that it would be highly inequitable and unjust to destroy the rights acquired, the doctrine of equitable estoppel will be applied") (internal quotations omitted). *See also DCRA v. Vu and Camacho*, Case No. CR-C-06-100009 (OAH October 16, 2006).

The Court of Appeals has recently reiterated its view that to succeed on a claim for estoppel under the circumstances of this case, a party must make a six-part showing: (1) expensive and permanent improvements; (2) made in good faith; (3) in justifiable and reasonable reliance upon; (4) affirmative acts of the District Government; (5) without notice that the improvements might violate the zoning regulations; and (6) equities that strongly favor the petitioner. *Bannum, Inc. v. D.C. Board of Zoning Adjustment*, 894 A. 2d 423, 431 (D.C. 2006).

In the instant matter, there is no dispute that Respondents had made expensive and permanent improvements on their property before DCRA's June 27, 2006, notice of intent to revoke Building Permit No. B477388. As of that date, Respondents had incurred at least $105,000 in costs to construct 85% the garage. In fact, the Government, to its credit, "concedes that the expense [incurred by Respondents for] the construction of the garage exceeded" the required threshold for application of the equitable estoppel doctrine, as established by the Court of Appeals. Government's March 1, 2007, Motion to Dismiss, page 11. (*See also Bannum*, 894 A.2d at 431; *Saah v. District of Columbia Board of Zoning Adjustment*, 433 A.2d 1114 (D.C. 1981)).

Respondents' expensive and permanent improvements were made in good faith and in justifiable and reasonable reliance upon affirmative acts of the DCRA without

notice that the improvements might violate the governing Zoning Regulations. Respondents reasonably relied upon DCRA's multi-layered and reviewed issuance of Building Permit No. B477388 when they began construction. DCRA does not dispute that issuance of Building Permit No. B477388 was an official and affirmative act. Rather, DCRA argues that Respondents "lack good faith and cannot argue that they were without notice that the improvements might violate the zoning regulations." March 1, 2007, Motion to Dismiss, page 11. The Government relies on four points to support these arguments: a) Inspector Rockett "notified the Respondents about the second story use as an artist studio violated the zoning regulations;" b) Respondent's neighbor Mr. Klein "informed Ms. Frey that he learned that the garage height was in violation of the zoning regulations;" c) Respondents acted in bad faith by "falsely indicating . . . that the proposed second story of the garage would be used as an artist studio;" and d) that Respondents had constructive knowledge of the Zoning Regulations. March 1, 2007, Motion to Dismiss, page 12.

The Government's assertion that Inspector Rockett informed Respondents that their intention to use the second story of their garage as an artist studio violated the Zoning Regulations is not borne out by Inspector Rockett's testimony at the January 23, 2007, hearing. During cross-examination, the following exchange took place:

> Question: Okay. And did you have any communications with anyone, either the contractors or the owners, at your April 19th visit to the property about your measurements?
>
> Answer: The contractor.
>
> Question: And what was said?
>
> Answer: Excuse me?

> Question: What was the communication?
>
> Answer: I informed him of the purpose of my visit and needed his help to help me get up there and measure the structure.
>
> Question: Okay. And I think you testified in response to a couple of questions from Ms. Wooldridge that you never had any contact personally via the phone or otherwise with either the Freys or any of their counsel, is that correct?
>
> Answer: Except for when I went to serve the Notice that the person on the other end identified himself, yeah.

Transcript, January 23, 2007, hearing, page 128-129.

Inspector Rockett's testimony on January 23, 2007, was that April 19, 2007, was the only time she visited the Property before she served the Notice to Revoke and that during that visit she never spoke to Respondents or their counsel. While Inspector Rockett testified that she told a contractor at the Property her purpose in visiting the Property, Inspector Rockett's testimony was that her purpose was to "conduct an inspection and take measurements." Transcript, January 23, 2007, hearing, page 106. Thus, there is no definitive evidence that Inspector Rockett ever warned Respondents that their proposed use of the second story of the garage was a violation of the Zoning Regulations.

Further, even Mr. Klein's testimony fails to establish that Respondents were warned that their new garage (may) violate the governing Zoning Regulations. In his testimony, the following exchange between Mr. Klein and counsel for the Government took place:

> Question: Did you ever go the Freys' property to meet with the Freys?

> Answer: No, I did not. The almost visit was when after my wife complained to the developer about the garbage appearing on our property and nothing happened. So, she told me about this on a – when I came home one day and so I just said well, why don't we walk over . . . . [W]e didn't actually step onto the property, but we were on the street next to it and we just indicated to them that the garbage was still streaming all over our property and could they remove it and then after that they did. The only other interaction that we've had with the Freys or their representatives was in September when Mrs. Frey made an unannounced visit to our house. . . .

Transcript, January 23, 2007, hearing, page 144 (emphasis added).

On cross-examination, Mr. Klein was asked whether he ever told Respondents that he had learned from Zoning Administrator Crews that the disputed garage violated the Zoning Regulations. Mr. Klein response, "[n]o, I did not see that as my job." Transcript, January 23, 2007, hearing, page 152. Thus, the record is devoid of any evidence establishing that Respondents knew or had reason to know that regardless of their duly-issued Building Permit, their garage violated the Zoning Regulations. Further, as noted above, I conclude that Respondents' Building Permit application did not contain false or misleading information.

DCRA argues that Respondents are charged with constructive notice of the District's statutes and regulations as an operation of law. However, the Court of Appeals has rejected this same argument in comparable situations:

> In the instant case, it can at most only be argued that petitioner, or his architect, *should have known* that the project, as presented in September, exceeded the maximum lot occupancy. However, the same can be said for the official who approved the plans, and we will not go so far as to decide that any of them were negligent in failing to discover the problem at that time. In hindsight, there is no question that the portion of the upper floors

> which extends over the passageway must be included in calculating the percentage of the lot occupied by the structure. Nevertheless, we do not consider petitioner's reliance upon approval of the permit applications to have been unjustified.

Saah, 433 A.2d at 1117 (emphasis in original, footnote omitted). Therefore, I conclude Respondents' expensive and permanent improvements were made in good faith and in justifiable and reasonable reliance upon affirmative acts of the DCRA without notice that the improvements might violate the governing Zoning Regulations.

Finally, the equities in the instant case strongly favor Respondents. By the time the Notice of Revocation was issued on June 27, 2006 (eight months after construction began on Respondents' house and garage), they had incurred costs of at least $105,000 to construct the garage. With the building permit revoked, Respondents are not able to finish or occupy the garage. If Respondents were required to tear the garage down, it would cost an additional $50,000. Of course, it would cost even more money to build a new garage on a different location on the Property. The financial consequences for Respondents are nearly ruinous. In comparison, the prejudice to the public if the building permit is not revoked is, on balance, significantly less. The Government has not articulated prejudice or harm to the public if the Building Permit is not revoked. "In zoning as in other areas of the law, the government *can* be wrong. In zoning, the equities *can* be so compelling as to favor the individual property owner." *Wieck v. D.C. Board of Zoning Adjustment*, 383 A.2d 7, 13 (D.C. 1978). I conclude that all of the required elements for application of the doctrine of equitable estoppel against DCRA are present in the instant case. *Bannum*, 894 A.2d 431-432. Therefore, I conclude, as a matter of law that Respondents are entitled to entry of judgment in their favor and that dismissal of the Notice to Revoke is warranted.

4. Laches

Given the disposition of this matter in favor of Respondents on the grounds of equitable estoppel, there is no need for this administrative court to address Respondents' argument that the equitable doctrine of laches bars DCRA from revoking the building permit.

IV. ORDER

Based on the foregoing findings of fact and conclusions of law and the entire record in this matter, it is, this 24th day of April 2007:

ORDERED that the Notice to Revoke Building Permit Number B475992 is **DISMISSED**; it is further

ORDERED that the appeal rights of any person aggrieved by this Order are stated below.

April 24, 2007

/SS/
Jesse P. Goode
Administrative Law Judge